

# Boucher's Statement before the Subcommittee on Telecommunications and the Internet

## STATEMENT OF CONGRESSMAN RICK BOUCHER

Energy and Commerce Subcommittee Hearing

H.R. 107, Digital Media Consumers' Rights Act

Thank you very much, Chairman Stearns for conducting this hearing today. I want to extend my thanks to you, to Ranking Member Schakowsky, to Chairman Barton of the Full Committee and to the Members of your Subcommittee for the interest that you're expressing by having this hearing today and assuring that we have appropriate balance in our copyright laws between the rights of the users of intellectual property and the rights of those who create it.

I also appreciate your interest in examining the possible need for changes in the 1998 statute, the Digital Millennium Copyright Act.

I want to say thank you to my friend and colleague from California, Congressman John Doolittle. My staff and I have worked very closely with John and his staff as we structured the measure that is before you and I want to thank Congressman Doolittle for his strong advocacy of the changes that we're seeking to make.

I would also like to say a special word of welcome this morning to our former colleague on this Committee, a former distinguished Member of the U.S. Congress, Congressman Al Swift, who is here to testify in support of H.R. 107.

And I'm very pleased to see the broad range of witnesses who have assembled today, possessing a tremendous amount of expertise on intellectual property and commercial issues. I am very pleased to see both the proponents and the opponents of H.R. 107, although I'll have to confess that I'm a bit more pleased to see the proponents.

In the 1990s, the entertainment industry came to the Congress and made an appealing claim. The entertainment industry said digital is different and there are twin threats simultaneously arriving that dramatically enhance the potential for the piracy of intellectual property. Those twin threats were identified as first the arrive of digital media, through which a

copy of a copy of a copy has the same clarity and integrity as the original of the work. The other threat that arrived at the same time was the Internet, through which thousands of copies can be transmitted around the globe with the click of a mouse.

That was an appealing claim. The industry said we have a threat coming from these two sources of enhanced piracy and Congress should provide greater protection to those who create intellectual property. I thought that the industry needed greater protection. In the end, I voted for the Digital Millennium Copyright Act. But during the course of hearings and debate in both of the Committees that considered the bill, the House Judiciary Committee and this Committee, I expressed concern about the over-reaching nature of the DMCA as it was being debated. I offered amendments that were very similar to those that we are recommending for enactment by this Committee in H.R. 107.

We've now has six years of experience since the passage of the DMCA , and many people who I think did not perceive that user rights were being threatened by the very broad nature of that statute, are now convinced that user rights have been eroded.

In 1998, most of the technology community was uninterested in this debate. We did not have computer manufacturers actively involved. The home recording rights industry was involved and was effective in the debate, but the broader technology community was not. Today, that broader technology community is supportive of H.R. 107 and very interested in seeing these changes made. We have computer manufacturers such as Gateway, Sun Microsystems, and component manufacturers such as Intel. We have all of the major local telephone companies and their trade association, the U.S. Telecom Association, strongly endorsing and urging the passage of this bill. These were parties not involved in the debate in 1998.

We also have a broad and deeply interested public interest community, comprised of librarians, universities, and the two largest consumer organizations in the nation. We have Public Knowledge, the Electric Frontier Foundation and others on the public interest side expressing their concern about the experience that we had with the DMCA since 1998 and urging that the changes contained within H.R. 107 be adopted.

The bill that we've put forward addresses four principal problems. Let me briefly describe what each of those is and our proposed remedy.

The first principal problem that we have is that, as Chairman Barton indicated in this opening statement, the current law says that it is a federal offense to bypass technical protection guarding access to a copyrighted work, even though the purpose of the bypass is innocent. And so if, a person is bypassing for the purpose of exercising a fair use right, that person is guilty of a federal crime. If you're bypassing for the purpose of getting beyond the commercials that are on the

front end of a DVD, that you have gone to the store and rented, if you want to bypass in order to fast forward through material that's on the DVD that you think is inappropriate for your children to see, you have committed a federal offense, even though the purpose of the bypass is innocent.

We are proposing as our first provision that bypass of technical protection is legitimate as long as the purpose of the bypass is itself legitimate. So if a person is bypassing to exercise a fair use right that act of bypass would not be punishable under the law. I would stress that a person who bypasses under our bill for the purpose of infringing the copyright in the work would be just as guilty of a federal crime as he is today under the current law. In fact, he would be guilty of two violations, the act of bypass itself and the act of infringing the copyright in the work. And that is the same penalty, the same substantive violation that he would encounter under current law. And so this provision is not a charter for pirates. It would punish pirates just as severely as under current law.

Secondly, we are proposing that devices that can facilitate circumvention for legitimate purposes be authorized. The Supreme Court in its Betamax decision in the middle 1980s set forth a very sound legal principle that provided a foundation of legal certainty upon which the home recording industry has been based, and that industry has flourished and significantly enriched the American economy and improved the quality of life of millions of Americans. That legal foundation was a very simple test. The only question you have to ask when you're determining whether or not technology is legitimate is whether or not the technology is capable of substantial noninfringing use. And if it is, the manufacturer will not be held accountable for contributory infringement. We are proposing to reinsert that valuable and time tested principle as the test for determining whether or not circumvention technology can be provided.

Two other provisions, very briefly stated. First of all, if you go to the store and you buy a copy protected CD, you should have notice of the fact that it's copy protected, that you may not be able to take it home and create your own CD with music organized in precisely the fashion in which you want to hear it. You should have notice of that fact so we would require appropriate labeling.

The second provision says that the existing exemption for encryption research would be broadened to include scientific research on technical protection measures. And this provision responds to a recommendation made by Richard Clark when he was the cyber security head in the White House and to many others who would like for people who want to consume technical protection measures to be given the certainty that they are robust, that they are durable, that they are functional. Only independent research can guarantee that. Independent research cannot be conducted today because of the narrow scope of the existing exemption.

These are our four provisions.

Mr. Chairman, I think they are modest amendments indeed. They are broadly supported by the organizations that have participated in their formulation and are urging the passage of this bill, as well as by a bipartisan group of Members of the House. And I very much hope it will be the pleasure of this Subcommittee to act affirmatively on them.

And I thank you very much for giving me the time to speak.